No. 90-597

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT and ANA C.,

Petitioner,

vs.

MIGUEL T. and LOUISE N.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

RESPONDENT - RAQUEL MARIE'S BRIEF IN SUPPORT

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QUESTIONS PRESENTED FOR REVIEW

In the interest of brevity, Raquel Marie ascribes to and supports the recitation of the questions presented in the Petition of her proposed adoptive parents.

LIST OF PARTIES

As required by Rule 21.1(b) an explanation is offered as to the parties to the proceeding as existed in the Court of Appeals of the State of New York. The caption of the case in this Court properly shows the prospective adoptive parents, as Petitioner, and the natural parents, as Respondents. In the Court of Appeals of the State of New York, and all lower courts, this proceeding was styled "In The Matter of Raquel Marie X".

Pursuant to Section 249(a) of the Family Court Act of the State of New York, the author of this brief was assigned by the Family Court, Westchester County, to represent Raquel Marie as her Law Guardian. In such capacity, the subject child, through her attorney, has fully participated in all phases of these proceedings, on the trial and appellate levels, and will continue to participate in this Court.

Pursuant to Section 1012 of the Civil Practice Law and Rules of the State of New York, the Attorney General of said state was given proper notice of the challenge to the constitutionality of the applicable statute. While the Attorney General did not appear or argue in the courts below on this matter, he did file a copy of a brief in a companion case in the Appellate Division, Second Department, which was accompanied by a cover letter, dated June 23, 1989, which highlighted this Court's decision eight days earlier in *Michael H.* in support of the constitutionality of said statute. Robert J. Schack, Assistant Attorney General, had articulated to the Law Guardian that the briefs of the adoptive parents and the attorney for Raquel Marie were more than adequate in defending the statute's constitutionality and, for that reason, the Attorney General chose not to file a separate brief in the Court of Appeals. However, after completion of oral arguments, at the direction of the Court of Appeals, the Attorney General did submit a copy of its cover letter to the Appellate Division and companion case brief. It is unknown whether the Attorney General will participate at this stage of the proceedings before this Court. (see Law Guardian's appendix for copy of Attorney General letter).

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Raquel Marie, the child who is the subject of this proceeding, files this Brief in support of the Petition of her proposed adoptive parents for a Writ of Certiorari to review the order of the Court of Appeals of the State of New York which determined that Section 111(1)(e) of the New York Domestic Relations Law violates the provisions of the United States Constitution.

OPINIONS BELOW

The Orders, Opinions and Decision below are correctly set out in the Appendix to the Petition (hereinafter "PA" with page number to be inserted as appropriate).

JURISDICTION

Raquel Marie fully supports the arguments articulated by Petitioner as to this Court's jurisdiction to review the determination of the Court of Appeals of the State of New York. Clearly, the decision below (PA-2) is a final determination by the highest court of a State which draws into question the validity of a state statute on the submitted ground of its being violative of the United States Constitution.

Regardless of the remittal of this matter to the Appellate Division, Second Department, by the Court of Appeals so as to determine the natural father's compliance with the interim, state law judicial standard which it announced (PA-18), its determination that the applicable statute is unconstitutional is a final order on the federal question and review can only be had to this Court. Notwithstanding the ultimate outcome of the state law issue in the lower courts, the invalidation of the bulk of New York's statutory scheme for adoptions on federal constitutional grounds should be reviewed by this Court due to its widespread impact and the improper reading of the prior precedents of this Court.

Accordingly, Raquel Marie subscribes to and supports the assertion in the Petition that the Court of Appeals order is a final determination pursuant to 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

The statute which was found unconstitutional by the Court of Appeals, Section 111(1)(e) of the New York State Domestic Relations Law, along with the relevant provisions of Section 111-a (notice requirements) are correctly set out in the Petition, at pp. 3-4.

HOW THE FEDERAL QUESTION WAS RAISED

From the commencement of the proceedings in the Family Court, Westchester County, Respondent Miguel T. has asserted his alleged ability to veto the proposed adoption on the grounds that to deny him such a right would be violative of his rights under the United States Constitution. In making this claim, Respondent Miguel T. properly served the Attorney General of the State of New York with the appropriate challenge to the constitutionality of the applicable statute. In the meanwhile, Respondent Miguel T. readily conceded that he could not literally comply with the criteria contained in Domestic Relations Law Section 111(1)(e). The Court of Appeals clearly stated in its opinion that its determination in striking down the applicable statute was made on federal, not state, constitutional grounds (PA-11).

STATEMENT OF THE CASE

Again in the interest of brevity, Raquel Marie fully subscribes to the statement of the case as provided in the Petition of her proposed adoptive parents. A careful analysis of this Court's prior precedents and other considerations will be presented in the "argument" section of this brief. A few points of emphasis only are required at this juncture.

This Court, in *Lehr v. Robertson*, reviewed the New York statutory scheme and focused on the notice requirement of Domestic Relations Law Section 111-a. Justice Stevens, in discussing sections 111(1)(e) and the notice requirement stated:

> Those procedures are designed to promote the best interests of the child, to protect the rights of interested third parties, and to ensure promptness and finality. (footnote omitted). To serve those ends, the legislation guarantees to certain people the right to veto an adoption proceeding. The mother of an illegitimate child is always within that favored class, but only certain putative fathers are included. 463 U.S. 248 at 266 (1983).

Mr. T., by virtue of his post-placement adjudication as the father and his subsequent marriage to the natural mother, became a "notice father" under *Lehr* and entitled to fully participate at a best interest hearing. He has fully accorded himself of this right during the trial held on remand from the Appellate Division, Second Department.

Several states have adhered to the notion that the primary focus of adoption statutes is the promotion of permanence and stability for children. In 1980, the New York Legislature, responding to this Court's decision in *Caban v. Mohammed*, 441 U.S. 390 (1979), enacted an easily ascertainable standard that was designed to alleviate much of the unwelcome uncertainty and anxiety that faced unwed mothers, unwed fathers, proposed adoptive parents and, certainly, the proposed adoptive child during the period immediately after *Caban*. The New York Legislature rejected a proposed bill that would have granted a veto right to unwed fathers who had shown "a significant parental interest in the child" as it would have established a vague and highly subjective test which would have engendered considerable and unnecessary litigation. Any such standard would be subject to the whims and preferences of the presiding trial judge. The statute which was enacted sought to follow the guidance of this Court in *Caban* and created a dichotomy between the adoptions of infants and the adoptions of older children. To the extent that said statute does not trample upon the constitutional rights of unwed fathers it should be upheld as promoting the clear interests of the State of New York in achieving promptness and finality in adoptions.

The decision of the Court of Appeals, in relying incorrectly upon this Court's precedents, has discarded the carefully crafted, objective test for determining whether an unwed father has made a requisite commitment to an enduring family relationship such that he would be entitled to veto the proposed adoption of his child. Instead, the Court of Appeals has returned the State of New York, unless this Court should decide otherwise, to the subjective, case-by-case analysis that the New York Legislature sought to avoid. Without question, if the Court of Appeals decision is permitted to stand, the effect on adoptions in the State of New York, and possibly many other states that would follow New York's lead, would be chilling. Proposed adoptive parents, unwilling

to risk the emotional trauma of a disrupted adoption and the enormous financial cost of extensive litigation, would be reluctant to enter into the process.

The applicable statute protected the rights of infant children such as Raquel Marie by preventing those unwed fathers who have belatedly manifested an interest in their children from interfering with the adoption of said child into a warm, stable home environment. In light of the Court of Appeals decision, unwed mothers, not desiring further involvement with abusive and violent fathers, may seek to abort their pregnancies rather than carry their children to term and provide them with permanence and stability through adoption. Abortion, not adoption, may be the only viable option for unwed mothers who seek to avoid the enormous potential for conflicts with unwed fathers under the subjective test announced by the Court of Appeals.

Raquel Marie would echo the remarks of her proposed adoptive parents in this section of their Petition as it pertains to the Court of Appeals misreading and misapplication of this Court's prior decisions. It is extremely important to note that, at the time of her placement for adoption, on July 22, 1988, Raquel Marie did not then have the benefit of an intact, or *de facto*, family relationship as defined by the decisions of this Court. The Court of Appeals seems to have totally ignored this Court's warning (by Justice Scalia) against viewing a liberty interest "in isolation from its effect upon other people." *Michael H. v. Gerald D.*, ____U.S.____, 105 L.Ed.2d 91 at 106-107, note 4 (1989). The abusive, non-caring demeanor of Raquel Marie's natural father cannot be viewed in isolation from its impact upon her frightened mother and the child herself.

The decision of the Court of Appeals also goes far beyond the approaches of many other state courts to this issue (as will be discussed in more detail) and affords a liberty interest to an unwed father who has not attempted, in any meaningful way, to establish an intact family relationship for the benefit of his child. As noted by the Appellate Division, Second Department below, the cohabitation requirement of the applicable statute - together with the other provisions - "serves the salutary purpose of ensuring that the consent of an unmarried father to an adoption will be

required where a meaningful family relationship has been established." (PA-25). Where her natural father has failed, prior to her placement for the purpose of adoption, to establish such an enduring family relationship, as contemplated by the precedents of this Court, Raquel Marie is entitled to the protection of the challenged statute which is constitutional in all respects. The right of Raquel Marie to permanence and stability in her prospective adoptive home should not be denigrated by the belated actions of her natural father who has failed to establish a "protected family unit under the historic practices of our society. . . ." *Michael H.*, 105 L.Ed.2d at 106.

The Court of Appeals did not disturb the factual findings of the lower courts in this matter which included the Appellate Division's observation that the relationship between Raquel Marie's natural parents was "tumultuous" and more specifically, her natural father was viewed as "violent". (PA-28). The Family Court noted that the relationship was "turbulent" (PA-36) and discerned a total lack of trust for and obligation to one another. In response to the Law Guardian's cross-examination, Miguel T. conceded in the Family Court that, as of the date of his marriage to Ms. N. on November 5, 1988, there was no "intact" family. (Tr. B438).[1] Clearly, a belated manifestation of interest should not be given constitutional protection and Raquel Marie is entitled to permanence and stability in her proposed adoptive home where she has resided since July 22, 1988.

THE FACTS

The case at bar is a bitterly contested adoption proceeding which was commenced in the Family Court of the State of New York, County of Westchester, in January of 1989. The object of this extensive litigation is Raquel Marie who was born on May 26, 1988 in White Plains, New York. (Tr. A17).

It should be noted that the hearing which is the subject of the present appeal was limited by the Family Court to the issue of

[1] As in all earlier briefs, all references to "Tr. A" are to pages in the transcript for April 28, 1989 and references to "Tr. B" are to those pages in the transcript for May 1, 1989 and all subsequent trial dates of the hearing on the natural father's veto right.

the natural father's consent. The Appellate Division, Second Department, reversing the Family Court on other grounds, stated that such bifurcation was an improvident exercise of the Court's discretion and that a hearing which would cover all issues (including best interests) should have been held. (PA-29). On remand, before a different trial judge, a hearing was commenced on all remaining issues (including best interests) at which the natural father has fully participated through counsel and which consumed eight full trial days until same was suspended awaiting action by the Court of Appeals.

The biological parents of Raquel Marie are Louise N. and Miguel T. (Tr. A17) who had first met in 1983 or 1984 while they were both students at Eastchester High School. (Tr. B4-5). At the time of Raquel's birth, Louise N. was 23 years old (Tr. B760) and unmarried.

Just 21 months earlier, on August 10, 1986, Ms. N. had given birth to Lauren, who was not the subject of this proceeding. (Tr. B15). This child was also fathered by Miguel T. (Tr. B5). Louise, herself, is one of seven children, the youngest of whom is only two years older than Lauren. (Tr. B554, 834-835).

Mr. T. did not graduate from high school while Ms. N. did (Tr. B4, B243) and as they dated each other it was readily acknowledged that they each also dated others. (Tr. B244). After high school, Mr. T. sought to claim that he was living with Ms. N. "part-time", actually weekends at the home of Mr. T's parents (Tr. B8), but he readily conceded that, when Louise went into labor with Lauren, the expectant mother had to be transported to the hospital from her parents' home (Tr. B9) and that is where she, and Lauren, returned after the birth. (Tr. B12).

While the Court of Appeals has ruled that, as a matter of state law, the period to scrutinize for determining whether a natural father should have a veto right is the six months preceding the placement of the subject child for the purpose of adoption, Mr. T's demeanor during Ms. N's pregnancy with Raquel, in comparison with his involvement at Lauren's birth, is instructive. While Mr. T. claimed to have participated in LaMaze classes with Ms. N. prior to Lauren's birth, and was present for the delivery

of their first child (Tr. B7-10), he took no such action with respect to Raquel. (Tr. B293). In fact, in the voluminous hospital records of Raquel's birth (Exhibit "C") there is no mention whatsoever of Mr. T. or his supposed presence at the hospital at any time. Instead, as will be further described, during Ms. N's pregnancy with Raquel, Mr. T. assaulted the expectant mother on several occasions.

The subject of marriage between Mr. T. and Ms. N. arose on numerous occasions - from 1985 until their "relationship" substantially deteriorated in mid-1987 - and each party clearly refused the other's proposals each time (Tr. B246-248) with Louise asserting that she did not "truly trust" him (Tr. B14) and Mr. T. echoed these sentiments. (Tr. B375, B747). This was not surprising given the often stormy and brutal nature of their relationship. It was not until November 5, 1988, three and one-half months after Raquel's placement for adoption, that Louise and Michael suddenly married under circumstances which have not yet been fully explored at trial. Subsequent to oral argument in the Court of Appeals, it was brought to the attention of the Court by counsel's letter of June 25, 1990, which was accepted and distributed to the judges of the Court, that the natural father and natural mother had separated previous to the oral argument due, in part, to additional incidents of violence. On information and belief, the natural father and natural mother are still living separate and apart.

Nevertheless, during a brief examination of the issue, Mr. T., responding to the Law Guardian's questions, acknowledged that his eventual marriage to Ms. N. was motivated at least in part by a desire to "help each other and get our child back" and to "*start* our lives as a family unit". (Tr. B414-emphasis added). Obviously, a "family unit" had never previously existed. Underscoring this point, Mr. T. readily conceded that, prior to November of 1988, "No, it wasn't an intact family." (Tr. B438).

In late 1986, Mr. T. and Ms. N. apparently discussed the prospect of residing together (Tr. B16) but this situation did not materialize due to supposed financial considerations. However, it is more likely that, in the course of their turbulent relationship, Ms. N. and Mr. T. did not commence living together at this

time because of their mutual lack of trust. Louise told Miguel "I don't know if I truly trust you as yet. If you can be the father of a child — the father of my child yet and to be there every day. . .". (Tr. B14).

Eventually, in April of 1987, Ms. N. and Mr. T. procured a domicile together, a small apartment in Scarsdale, New York. (Tr. B18-19). This attempt to establish an "intact family" was feeble and unsuccessful as the very next month Ms. N. alleged that Mr. T. was having a sexual involvement with the tenant next door. (Tr. B20, B881 and B375). During this time frame, Louise suffered from a case of pubic lice (Tr. B880), likely transmitted to her by Mr. T., and Miguel offered as a misguided rejoinder that he could have gotten pubic lice from Ms. N. (Tr. B274). Ms. N. readily stated that during this period of time, when they were supposedly living together, she heard repeated "rumors" that Mr. T. "had been involved with other women." (Tr. B880).

During this abbreviated attempt at living together, Mr. T. apparently impregnated Ms. N. once again (Tr. B149-150) and Ms. N. obtained an abortion without his knowledge or consent in July of 1987. On later learning of this abortion, Mr. T. became upset though he denied he was angry enough to hurt Ms. N. (Tr. B150). This effort at establishing a domicile abruptly terminated in July 1987 with Ms. N. leaving the apartment and, one week later, Mr. T. did the same. (Tr. B21). Each party then returned to the homes of their respective parents. With the exception of approximately one week after Raquel came home from the hospital, this three month experiment had been the sole (pre-placement) period of time that Mr. T. and Ms. N. lived together. In apparent retaliation for Ms. N's procuring an abortion, Mr. T. assaulted Ms. N. on July 19, 1987 at the home of her parents (Tr. B157-158). Mr. T. punched Ms. N. in the left eye and she was taken to a local hospital. An Order of Protection was issued to Ms. N. by a local criminal court (Tr. B159). The trial court, over extensive objections, permitted no further probing of any assaults by Mr. T. upon Ms. N. prior to this date. (Tr. B681-684).

In September 1987, while Ms. N. and Mr. T. were still living with their respective parents (Tr. B554-555), Ms. N., once again, was impregnated. (Tr. B556, 571-572). Ms. N. readily volunteered

to a representative of the District Attorney's Domestic Violence Unit that she had been raped by Mr. T. and that her pregnancy resulted from said act. (Tr. B687). Well before the birth of Raquel Marie, and the trial of this matter, Ms. N. also described the September 1987 incident as a rape to an Assistant District Attorney. (Tr. B692). At the hearing of this matter, Ms. N., having since joined forces with Mr. T., sought to minimize the significance of her earlier rape accusations by protesting that "I just looked at it as I'm so angry that he got me pregnant". (Tr. B687). However, Ms. N. conceded that there was a strong relationship between the July 1987 abortion and the "rape" (and pregnancy) of September 1987 - "it had something to do with what I had done previously". (Tr. B888). Despite the gloss which Ms. N. attempted to put on the September 1987 incident during her testimony, her July 1988 statement to a caseworker of Family Consultation Service of Eastchester (Joan Elkin) clearly characterized the "rape" as a pay-back by Mr. T.: "Louise claims that her most recent pregnancy was a result of Michael forcing himself on her in retaliation for the abortion". (Exhibit "K"). Said records further reflect Ms. N's statements that Mr. T. "has used and dealt cocaine and that he smokes pot."

Louise further remarked to Ms. Elkin that Mr. T. "has been with other women" and while he promises assistance with their children he, instead, "flees" and pays no attention to them. In addition, Louise also remarked to a caseworker at the Spence-Chapin Agency in June and July 1988 that Mr. T. was "unreliable, physically and verbally abusive and unfaithful to her (Louise)." (Exhibit "14").

Mr. T., now aware of Louise's pregnancy (Tr. B572) confronted Ms. N. in a local restaurant parking lot on October 31, 1987 and assaulted her once again. This incident was reported to the police. (Tr. B706-708). Consistent with Ms. N's concerted effort to downplay numerous violent altercations with Mr. T. at trial, Louise proclaimed difficulty in recalling "all these little incidences." (Tr. B707).

Several days later, on November 4, 1987, Mr. T. came to the home of Ms. N's parents in Tuckahoe at a time when Ms. N. described "hostile things (were) happening between" them.

(Tr. B630). Another violent altercation ensued (Tr. B633-634) and Louise's statement to the police revealed that Mr. T. kicked in the front door and threatened to hurt the now pregnant Ms. N. if she "brought any other men into the house." (Exhibit "I"). As a result of this incident, Ms. N. filed additional criminal charges against Mr. T., alleging that he had violated the Order of Protection which she had obtained in July of that year.

Approximately ten weeks later, on January 19, 1988, Mr. T. again forced his way into the house of Ms. N's parents - grabbed the now 5 months pregnant Louise - and left a mark on her neck. (Tr. B662-663). Ms. N. attempted to call the police for assistance but was physically prevented from doing so by Mr. T. (Tr. B667-668). On March 1, 1988, Mr. T. plead guilty to assault in the third degree (and criminal mischief 4th) in full satisfaction of all six pending charges brought against him by Ms. N. He was sentenced to three years probation and ordered to pay restitution to Ms. N.

In March of 1988, Ms. N. and her daughter, Lauren, moved from the home of her parents in Tuckahoe to an apartment in Mt. Vernon. Ms. N. located this apartment through the services of a real estate broker and utilized her own funds, and public assistance benefits, to pay all necessary charges and fees. Ms. N's relatives assisted her in moving furniture into the previously unfurnished apartment and Ms. N. purchased all remaining personal effects and necessities. (Tr. B558-565). All of this was done without the assistance, participation or involvement of Mr. T.

Later in March of 1988, having just resolved six pending criminal charges against him by Ms. N., Mr. T. vindictively dragged Ms. N. back to the Family Court seeking an order to reduce his support payments for Lauren. (Tr. B333). Two months previously, though both Mr. T. and Ms. N. sought to portray their relationship at trial as no different from any typical married couple, Ms. N. wrote to the Family Court and alleged that she had "not received any form of child support" whatsoever from Mr. T. and that she was solely supporting Lauren. (Exhibit "H"). A similar statement was made by Louise to a Department of Social Service representative when she sought public assistance benefits. (See Exhibit "G").

On February 18, 1988, Mr. T. had arranged for Ms. N. to submit to a sonogram. (Tr. B40). However, same was not obtained by Mr. T. due to any medical necessity - or fatherly concern for the well-being of the fetus - but as some type of misguided and convoluted defense to the numerous assault charges then pending against him in the local criminal court: "To show my emotions why I was, you know, getting roused up at whatever she would do." (Tr. B373). Mr. T's then and present counsel attempted to use the fact of Louise's pregnancy - with yet unborn Raquel Marie - to try and defeat the criminal charges then pending by Ms. N. (Exhibit "13"). Having assaulted the pregnant Ms. N. on several occasions, Mr. T. had obviously expressed no concern whatsoever for yet unborn Raquel Marie's medical status. Instead, Mr. T's simple motive was to avoid a jail term, which was not unlikely as a result of the alleged rape and the continuing threats and assaults upon Ms. N. during her pregnancy with Raquel.

In the midst of this stormy, tense and violent relationship, Ms. N. had mentioned on several occasions to Mr. T. the prospect of her placing the yet unborn child for adoption and Mr. T. readily acknowledged that he was aware of this possibility as early as October, 1987. (Tr. B379, 381). Nevertheless, despite Mr. T's supposed opposition to the prospect of adoption (Tr. B96-100) and the availability of able counsel, Mr. T. claimed that legally there was "nothing" he could do until after the baby was born. (Tr. B99). Obviously, if he had wanted to forestall an adoption, Mr. T. could have sought a paternity adjudication during Louise's pregnancy under Section 517(a) of the Family Court Act of the State of New York. Mr. T. did not file with the putative father registry nor did he submit a paternity petition until more than seven weeks after Raquel's birth. Prior to said filing the bulk of Mr. T's energies were directed to using the fact of the pregnancy in a purely defensive mode, seeking to defeat or defuse the then pending criminal proceedings. Mr. T's callous indifference toward the fetus and repeated assaults upon the pregnant mother underscored his lack of interest in yet unborn Raquel Marie.

After Raquel Marie's birth on May 26, 1988, she was retained in White Plains Hospital for a few additional days, allegedly for medical reasons. (Tr. B301). Ms. N. lamented that she was just too tired to deal with the baby (Tr. B757-758) but it appeared

more likely that Raquel Marie remained because Ms. N. was mulling over the prospect of adoption. In any event, Louise, Lauren and Raquel eventually returned to Ms. N's Mt. Vernon apartment. Apparently, Mr. T. stayed over at the apartment "after work" for approximately one week after Raquel's arrival (Tr. B72) but left because Mr. T. believed "it wasn't safe for me to stay there at night." (Tr. B85). Thus, at the time of the child's placement, on July 22, 1988, Mr. T. had lived with Ms. N. for a grand total of one week during the preceding one year period.

Having concluded the one week stay with Ms. N., during which Mr. T. and Ms. N. argued repeatedly (Tr. B85), Miguel soon returned to Louise's Mt. Vernon apartment on June 9, 1988 and another violent altercation ensued. It is readily apparent that this incident occurred in the presence of both Raquel and Lauren. Mr. T. complained to Ms. N. that she looked like a "slut and a whore," that her clothes were "bimbo" clothes and he proceeded to physically pull off her clothes. (Tr. B205-206). Obviously, there was no end to the stream of violence directed by Mr. T. against Ms. N., regardless of the Tuckahoe Criminal Court assault conviction, Mr. T's placement on probation and an existing permanent Order of Protection. In June of 1988, Mr. T. continued to heap physical and mental pressure upon Ms. N. and it showed no signs of subsiding. However, Mr. T., supposedly concerned about the prospect of Raquel being placed for adoption, did not commence any legal proceedings during that month or the first part of July because, according to Mr. T., he and Ms. N. "had no problems". (Tr. B304). During this period, Ms. N., finding it "hard" to deal with both small children (Tr. B714) apparently continued to sift through various adoption prospects. Ms. N's difficulty in attempting to care for two small children was certainly compounded by Mr. T's concession - in a monumental understatement - that "there were times when I wasn't there." (Tr. B90). When Mr. T. was present, which was rarely, there was palpable tension and physical abuse.

On June 20, 1988, Ms. N. decided to test Mr. T's resolve with respect to Raquel Marie's future. Ms. N. came to the residence of Mr. T's parents, dropped Lauren (22 months) and Raquel (3 1/2 weeks) at the door, spit at Mr. T. and told him "they are your kids. . .you figure out what to do with them." (Tr. B386). Neither

party had previously obtained any order of custody with respect to either child. Despite Mr. T's clear understanding that Raquel Marie might be given up for adoption, and his pondering possible legal remedies or redress, he took no self-help measure at the opportune moment. (Tr. B388).

Mr. T. failed to retain custody and control over Raquel or to immediately seek an order of temporary custody. His paramount concern, as expressed at trial, was the existence of an Order of Protection (which was entered on behalf of Ms. N. only) and not wanting "to get in any more trouble that [sic] he was already in." (Tr. B387-388). Louise testified that she had deposited both children on Mr. T's doorstep on said date because "if he wanted all the responsibility, then for him to take it." (Tr. B745). Mr. T., consistent with his prior pattern, thinking selfishly of his continuing battles with Ms. N., did not seek to exercise parental responsibility and control over Raquel so as to forestall an adoption. Ms. N. promptly retrieved both children. (Tr. B387, 744-745).

Thereafter, Louise notified Mr. T. that she was seeking to place Raquel Marie "in foster care" and he agreed because "she needed a break." (Tr. B92). Thus, three days after the incident described above, on June 23, 1988, Louise placed Raquel Marie in the Spence-Chapin Agency where she remained until July 12, 1988. (Tr. B90-96, 304-305). While both natural parents sought - at the trial of this matter - to portray this placement as a temporary, "baby-sitting" arrangement, in reality this was a prelude to the proposed adoption of this child. Despite the fact that Mr. T. was well aware of Ms. N's adoption plans - as early as October, 1987 (Tr. B379-381, 96, 286 and 388) - and knew of the Spence-Chapin placement in advance, he made no objection thereto and continued to profess that he "was always kept in the dark" about adoption. (Tr. B303). Despite his supposed concern over what Ms. N. would do with Raquel, Mr. T. never visited Raquel during the three weeks she was at Spence-Chapin and did not file any proceeding in court until July 19, 1988. (Tr. B306-307).

On July 12, 1988, after a dispute over visitation with the child, Louise retrieved Raquel from Spence-Chapin and moved in prompt fashion to finalize a private placement adoption.

(Tr. B429). Within a few days after Raquel's return from Spence-Chapin, Mr. T. arrived at Ms. N's apartment while she was on the phone with a prospective adoptive couple, Mr. & Mrs. C. At that time, Mr. T. was told by Ms. N. that she was talking to the "people who are thinking of adopting. . . a family in New Hampshire". (Tr. B430). Having known about Ms. N's plans to place Raquel for adoption as far back as October, 1987 (Tr. B379-381) - and now learning that Ms. N. was talking to specific people about the adoption - Mr. T. still did nothing for approximately one more week. (Tr. B429-432). While not being privy to numerous other conversations between Ms. N. and other prospective adoptive couples and/or their attorneys, when Mr. T. was confronted with the prospect of Ms. N. speaking to specific people about an adoption his response was to walk out of Ms. N's house. (Tr. B379).

On July 19, 1988, Mr. T. filed a petition in Family Court seeking custody of Raquel and Lauren. While Mr. T. sought to assert in the trial court that he was seeking legal recourse to prevent or forestall a possible adoption, the petition which he completed and verified makes no mention whatsoever of any possible adoption. To the contrary, Mr. T. alleged that Ms. N. was not "able to care for the children while she is working or in school" and, incredibly, that he "can provide a stable home environment." (Petition of July 19, 1988). These papers were not served upon Ms. N. until one week later, July 26, 1988.

On July 22, 1988, Ms. N. executed the documents in reference to this adoption proceeding and delivered Raquel Marie to petitioners. Said documents reflected Ms. N's intention and desire to consent to the adoption of Raquel by Mr. & Mrs. C. (Petition, PAR. 12 and Exhibit "B" thereto). In said papers, Ms. N. acknowledged that she was placing Raquel for adoption because she recognized that she would be unable to provide a good home for the baby and that Mr. & Mrs. C. would provide "a fine home with a stable family environment which is something I could not provide a child at this time." (Petition, Exhibit "B"). Raquel Marie has lived continuously with Mr. & Mrs. C. in New Hampshire from July 22, 1988 to date. The author of this Brief visited with Raquel Marie in her home on November 25, 1989, and found her to be well integrated into a warm, loving home environment.

After the placement of Raquel, Mr. T. sought to gain the assistance of Ms. N. in obtaining Raquel's return. Ms. N. resisted for several months. An order declaring Mr. T. to be the father of Raquel was made in August of 1989 in the Family Court in proceedings held without notice to Mr. & Mrs. C. (Tr. A35).

On October 1, 1988, there was another violent incident between the natural parents wherein Mr. T. pulled out clumps of Ms. N's hair. (Tr. B213-214). Three days later, Mr. T. assaulted Ms. N's good friend, Nancy L., for which he was also charged in a criminal court. In bizarre fashion, Mr. T. and Ms. N. were married on November 5, 1988 and Ms. N. then joined Mr. T's various legal efforts to gain Raquel's return. As noted previously, during the pendency of this matter in the Court of Appeals, Mr. T. assaulted Ms. N. on two separate occasions, necessitating the issuance of yet another Order of Protection, and the parties once again separated. While Mr. T. once sought and obtained counselling for his propensity for violence at the Westchester Jewish Community Center (Tr. B338) he later admitted that, despite having received therapy, incidents of violence continued. (Tr. B389).

As previously noted, Mr. T. acknowledged that his marriage to Ms. N. was motivated by their desire to "help each other and get our child back" and to "start our lives as a family unit." (Tr. B414). Without dispute, no intact family existed prior to November 5, 1988 and Mr. T. had conceded this fact. (Tr. B438). Ms. N. who had hoped to provide a better life for Raquel Marie through the adoptive placement eventually relented to unceasing pressure and joined Mr. T's efforts. Nevertheless, Ms. N. had stated to a Spence-Chapin caseworker that she was "frightened with the prospect of raising two children on her own, and . . . is frightened by the BF [birth father] who is violent". (Exhibit "14"). These proceedings ensued.[2]

REASONS WHY WRIT SHOULD BE GRANTED

So as to avoid any unnecessary repetition, Raquel Marie does fully subscribe to and support the reasons cited in her proposed

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[2] Raquel Marie fully subscribes to the statement of facts as contained in the Petition of her proposed adoptive parents.

adoptive parents' petition as to why this Court should grant review. A brief, additional statement on behalf of the child is appropriate at this point.

The substantial distortion of this Court's prior decisions by the New York Court of Appeals effectively denies to Raquel Marie, and children similarly situated, the fundamental right to permanence and stability in their lives. Raquel Marie's natural mother sought to place her for the purpose of adoption so as to afford her a chance at a warm, stable home environment. A determination by the New York Court of Appeals to accord a liberty interest to an unwed father, who has not previously established a nurturing, substantial family relationship as recognized under the historic practices of our society for the benefit of such child, will leave children such as Raquel Marie in a state of indefinite limbo and subject to substantial, emotional trauma. Children are entitled to the protection which a clear-cut, objective standard offers to determine whether their natural fathers should be accorded a veto right over any proposed adoption of such child.

Prior to this Court's decision in *Michael H. v. Gerald D.*, there was a wide divergence of approaches by various high state courts to the issue of unwed fathers' rights in newborn children. Many of these courts have struggled to interpret the precedents of this Court prior to *Michael H.* The profound disagreement between the various Justices of this Court in *Michael H.* will not provide substantial guidance for state courts and legislatures in this area. If permitted to stand unreviewed, the New York Court of Appeals decision will mark an extreme position on this issue and may likely be followed by other states. As will be addressed in the argument section of this brief, several high courts of other states have taken an adverse view to that of New York and, it is submitted, specific guidance is required from the Supreme Court on the rights of unwed fathers to veto adoptions of their newborn children so that this substantial divergence of opinions will not continue. Until such time as definitive guidance is provided by this Court it is entirely likely that a subjective standard for determining the rights of unwed fathers will lead a majority of natural mothers to ignore the prospect of adoption, fearing an uncertain process and result, and instead seek to abort the children which they are carrying. The adoption statutes of the

various states, including that of New York, should be promoted to the extent that they do not trample upon the constitutional rights of unwed fathers and, in this regard, the case presented is most significant and deserving of review.

ARGUMENT

POINT I

SECTION 111(1)(e) OF THE DOMESTIC RELATIONS LAW IS CONSTITUTIONAL IN THAT IT GIVES A VETO RIGHT TO NATURAL FATHERS WHO SATISFY THE CRITERIA PRESCRIBED THEREIN AND FULFILLS COMPELLING STATE INTERESTS INCLUDING THE ADOPTION OF ILLEGITIMATE NEWBORNS INTO STABLE ADOPTIVE FAMILIES

The New York Legislature, in enacting the amended statute during 1980, sought to follow the guidance of this Court in *Caban* so as to distinguish between the problems attendant to the adoptions of newborns as opposed to older children. 441 U.S. at 392. The statute was carefully patterned to recognize the distinction which exists between inchoate rights of a natural father, by virtue of the biological connection only, and those rights which, by his own, affirmative substantive actions, become entitled to constitutional protection. With respect to newborns, the cohabitation requirement of the statute (along with the other criteria) convincingly serves one of the State's legitimate and compelling interests in providing for the child the likelihood of two natural parents in the home. Where the unwed father has manifested his concern and commitment to the subject child, by creating an intact or *de facto* family relationship, he will be entitled to veto any proposed adoption. Where the unwed father has failed to meet these carefully drawn, objective criteria, the adoption may proceed on the consent of the unwed mother only thus also serving the State's legitimate and compelling interest in providing the prospective adoptive child with a stable and secure adoptive home and encouraging promptness, certainty and, most importantly, finality in the adoption process. *Lehr*, 463 U.S. at 266, *Matter of Female D.*, 83 A.D.2nd 933 at 935, 442 N.Y.S.2d 575

(N.Y.App.Div. 1981), *Matter of Michael Patrick C.*, 83 A.D.2d 932 at 933, 442 N.Y.S.2d 579 (N.Y.App.Div. 1981).

As this Court cogently observed in *Lehr*, citing other cases, it is the day-to-day involvement of the unwed father in the life of his child that will give rise to rights of constitutional dimension.

> "The importance of the familial relationship, to the individuals involved and to society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children . . . as well as from the blood relationship." 463 U.S. at 261, citing *Smith v. "OFFER"*, 431 U.S. 816 at 844 (1977), quoting *Wisconsin v. Yoder*, 406 U.S. 205 at 231-233 (1972).

A proper reading of this Court's cases on the rights of unwed fathers appears to accord a liberty interest to said fathers, in their children, where they have demonstrated substantial efforts to create an intact family unit under the historic practices of our society or, with respect to older children, to develop a substantial and continuing relationship with such child. While this Court has not dealt squarely with a case involving the veto rights of unwed fathers to newborn children, it is is submitted that, as Justice Scalia made clear in *Michael H.*, after giving a careful analysis of this Court's precedents, the presence of a constitutionally protected liberty interest is dependent upon the presence of a family relationship. 105 L.Ed.2d at 106-107. Likewise, Justice Stevens, in *Michael H.*, found constitutionally protected rights to exist in "an enduring 'family' relationship". 105 L.Ed.2d at 112. Regardless of the Court of Appeals attempt to obfuscate its own interpretation of Supreme Court precedent, it is undeniable that the biological father in *Michael H.* not only lost in this Court but was denied a lower-court hearing on the visitation issue altogether. Mr. T. in this matter, has been afforded a "best interests" hearing.

The major flaw in the Court of Appeals reasoning in this matter is the inability of a natural father to maintain contact with

an unborn child. The only realistic and conceivable way to measure a natural father's commitment and concern to his unborn child is by virtue of his establishing an intact family setting for that child to live and thrive (as well as monetary support and "holding out"). To this end, the quotation provided from *Matter of Robin U.*, 106 Misc.2d 828, 435 N.Y.S.2d 659 at 662 (N.Y. Fam.Ct. 1981) is vividly on point (Petition at pp. 20-21). It would be redundant to again state the insightful analyses of this Court's leading precedents as recited in pages 20 through 25 of the Petition. Raquel Marie does fully subscribe to the treatment therein given of *Stanley V. Illinois*, 405 U.S. 645 (1972), *Quilloin v. Walcott*, 434 U.S. 246 (1978) as well as *Caban*, *Lehr* and *Michael H.* It is abundantly clear from a reading of these cases that this Court has only granted constitutionally protected rights to unwed fathers where there has been a *substantial* period of living together. Moreover, as noted earlier, this Court has previously upheld New York's statutory scheme while focusing, specifically, on the notice requirement in *Lehr.* The effort by the New York Court of Appeals to utilize *Lehr* in declaring another part of the same statutory scheme unconstitutional appears to be a contradiction on its face. Raquel Marie would also underscore the argument of her proposed adoptive parents (Petition at pp. 22-23) that there should be no distinction between "stranger" adoptions and that made by a step-parent because such a differential analysis was expressly rejected by this Court in *Lehr.* 463 U.S. at 262, footnote 19.

Furthermore, it is submitted that a careful examination of the relationship between Raquel Marie's natural father and mother is appropriate in order to determine if Mr. T. has a liberty interest in his child. Justice Scalia, in *Michael H.*, specifically rejected the notion that a father's rights are to be determined only by his biological relationship to the child. To do so would afford constitutionally protected rights to a rapist. 105 L.Ed.2d at 106-107. Mr. T's relationship with Ms. N. should properly be the focus of scrutiny (not in isolation), to the extent that - under New York's statutory criteria - it created a "unitary" family for the benefit of Raquel Marie. The violent and turbulent relationship between her natural parents, which has resulted in their separating once again, is not of the sort that this Court has

accorded historic respect in our society and should not thereby imbue Mr. T. with an absolute veto right over Raquel Marie's opportunity for adoption into a loving, stable home.

Interestingly enough, while this Court agreed in *Caban* that its ruling was limited to an older child, whose father had participated in raising to a substantial degree, four Justices, in dissent, opined that the unwed mother of a newborn should be given the exclusive right to consent to that child's adoption though this issue was not presented in the case before them.

> Such a rule. . . facilitates the interests of the adoptive parents, the child, and the public at large by streamlining the often traumatic adoption process and allowing the prompt, complete and reliable integration of the child into a satisfactory new home at as young an age as is feasible. 441 U.S. at 380-381 (and see dissent by Justice Stewart).

New York's amended statute, following the reasoning of this Court in *Caban* gave unwed fathers far greater protection then would have the dissenters above.

In an effort to add to the breadth of discussion in her adoptive parents' petition, Raquel Marie would offer herein a cross-section of the efforts made by various high state courts to tackle these issues and, in part, interpret the cases cited above. A review of this wide range of constitutional discourse should lead this Court to the conclusion that definitive guidance for state courts and legislatures is required in the area of newborns, unwed fathers and the adoption process.

The Oklahoma Supreme Court rejected the due process and equal protection challenges mounted by an unwed father of a newborn and utilized four of this Court's precedents (predates *Michael H.*) to state that a biological father was not even entitled to notice of an adoption proceeding where he had not assumed any responsibility for the support and care of the mother and child during her pregnancy or at birth. *In Re Baby Boy D.*, 742 P.2d 1059 (Okla. 1986).

The Oregon Court of Appeals held, in *In Re The Adoption of N.*, that an unwed father is not entitled to notice of an adoption proceeding even under the circumstances where he is not aware of the child's existence and is thus precluded from taking even small affirmative steps toward establishing a parental relationship. 66 Or. App. 66, 673 P2d 864 (Or.Ct.App. 1983) (citing *Stanley*, *Quilloin*, *Caban* and *Lehr*). Said court relied heavily on *Lehr*, articulating that the mere existence of the biological link between the unwed father and his child did not by itself entitle the man to constitutional protection of his parental interest.

The Supreme Court of Nebraska upheld, against a constitutional challenge, an extremely strict five day filing requirement for unwed fathers to acknowledge paternity and thus be entitled to notice of an adoption proceeding. *Shoecraft v. Catholic Social Services Bureau*, 222 Neb. 574, 385 N.W.2d 448 (Neb. 1986). Said Court stressed the interest of the mother, child and state in placing newborns as rapidly as possible with those who are able to serve as adoptive parents. This view of the strict filing requirement has been somewhat limited, but not reversed, in a subsequent Nebraska Supreme Court decision. *S.R.S. v. M.C.C.*, 225 Neb. 759, 408 N.W.2d 272 (Neb. 1987).

In contrast, the Utah Supreme Court, construing a state statute which required that an unwed father file a notice of paternity before an adoption petition or have his rights cut off, without citing a single precedent from this Court, refused to allow this requirement to defeat the father's rights where there had been deliberate, deceptive actions by the natural mother to hide the fact of the birth and to expedite the adoption filing which took place two days after the baby was born and one day before the natural father filed his paternity claim. However, a strong and well reasoned dissent roundly criticized the majority's total lack of constitutional analysis and asserted that this Court's holding in *Lehr* would have compelled a finding that no notice to the father was required. *In Re Baby Boy Doe*, 717 P.2d 686 (Utah 1986).

The Wisconsin Supreme Court found that an unwed father's negative pre-birth behavior, including criminal acts and

incarceration, could be used to justify a termination of his parental rights and freeing the child for adoption. *In Re Baby Girl K.*, 113 Wis.2d 429, 335 N.W.2d 846 (Wis. 1983), *app. dism.*, 465 U.S. 1016 (1984). Likewise, the Texas Supreme Court, stressing the important interest to be served by adoption, upheld dissimilar treatment of unwed mothers and unwed fathers so long as the natural father was given notice and the opportunity to participate in a best interest hearing. *In Re T.E.T.*, 603 S.W.2d 793 (Tex. 1980), *cert.denied*, *Oldag v. Catholic Charities*, 450 U.S. 1025 (1980). The Texas Supreme Court further noted that to give the unwed father a potential veto over a proposed adoption would give him a "powerful club with which he could substantially reduce the options available to the unmarried mother". 603 S.W.2d at 797.[3] Opposite extremes on this same issue have also been posited by the states of Delaware (favoring adoption)[4] and Virginia (favoring father's rights).[5]

In addition, sixteen states[6] have adopted the Uniform Parentage Act which is designed to generally give those fathers fitting into the category of "presumed" the right to veto a proposed adoption. In the State of California, an uproar followed the decision of that state's Supreme Court in *In Re Baby Girl M.* which sought to urge the policy goal of insuring all biological fathers an opportunity to enter into a possible custodial relationship with their children. 37 Cal.3d 65, 688 P.2d 918, 207 Cal.Rptr. 309 (Cal. 1984). In response to a groundswell of public opinion, the California Legislature amended its version of the U.P.A. to clearly provide that in any dispute between an "alleged father", who is not

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[3] The Court of Appeals of Louisiana, relying on *Lehr*, has also upheld different treatment of unwed fathers by permitting them to participate in a best interest hearing. *In Re Baby Doe*, 492 SO.2d 508 (La. Ct. App. 1986).

[4] *In Re Karen A.B.*, 513 A.2d 770 (Del. 1986).

[5] *Augusta Co. Department of Social Services v. Unnamed Mother*, 3 Va.App. 40, 348 S.E.2d 26 (Va. Ct. App. 1986).

[6] Alabama, California, Colorado, Delaware, Hawaii, Illinois, Kansas, Minnesota, Montana, Nevada, New Jersey, North Dakota, Iowa, Rhode Island, Washington and Wyoming.

a "presumed father", and the prospective adoptive parents, the court shall conduct a best interests hearing to determine whether the adoption may proceed. Cal. Civ. Code Section 7017(d) (West 1983). This Court had granted certiorari in a similar case coming out of California but then later dismissed the appeal for want of a properly presented federal question. *McNamara v. County of San Diego Department of Social Services*, 488 U.S. 152 (1988).

While the above mentioned cases construe a wide variety of adoption statutes, the decision of the New York Court of Appeals, if unreviewed, would clearly stand on a far extreme of granting to unwed fathers an opportunity interest based merely upon the biological connection largely without regard to the pre-birth behavior of the unwed father. Counsel would submit that this case provides an ideal opportunity for the Court to provide definitive guidance to the various states on the federal constitutional parameters of the unwed father's consent involving newborns. The trial record in this matter does not disclose a situation where the natural mother thwarted the efforts of the natural father to establish a substantial, family relationship for the benefit of the child. Instead, the parties did not reside together because they each refused the other's marriage proposals, were involved in repeated incidences of violence and had romantic entanglements with others. Mr. T's acknowledgment that no "intact" family existed more than three months after the child's placement for adoption is compelling. (Tr. B438). Clearly, the natural parents did not form the type of "unitary" family whose relationships are entitled to historic respect in our society and thus any liberty interest which Mr. T. would have had in his child is not entitled to constitutional protection. At best, Mr. T. should be afforded the opportunity to address "best interests" and the State of New York has, unquestionably, provided him with this right as will be discussed further herein.

Raquel Marie would concur with the delineation of the compelling state interests which are promoted by the applicable statute as stated on pages 26 and 27 of her adoptive parents' Petition. Insulated to date from the litigation which has swirled about her since July 22, 1988, Raquel Marie is, in one respect, fortunate to be alive and have her case before the courts. Without question,

Robert and Ana C. have been, and remain, committed to Raquel. However, if the Court of Appeals determination is upheld, many unwed mothers, facing similar circumstances, may seek to avoid the enormous emotional trauma involved, and terminate their pregnancies. Accordingly, fewer children will be available for adoption. In turn, prospective adoptive parents, faced with a highly subjective test of determining a natural father's rights, malleable with each individual jurist, will be disinclined to enter the process in New York (and other states which might follow New York's decision).

Other societal risks from permitting this decision to stand may include: the placement of children in indefinite foster care; black marketing of children; and unwed mothers keeping unwanted children under less than desirable circumstances. A subjective test to determine an unwed father's rights will unnecessarily complicate the adoption process, adversely affect the finality of adoption decrees and cause a proliferation of litigation. Children (who are born) that are sought to be placed for adoption by unwed mothers, who genuinely desire for them to have a better future, will join Raquel Marie in a seemingly endless state of legal limbo.

The criteria of the applicable statute are reasonably designed to satisfy constitutional requirements in that the child, at an extremely young age, will either have a demonstrated commitment from his natural father, by virtue of the creation of an intact or unitary family relationship (and possibly a future with said natural father), or the avenue of an adoption into a warm, stable family environment will be unimpeded by a natural father who shirks his responsibilities or belatedly seeks to manifest his interest. The inchoate rights of the latter class of natural fathers, by virtue of the mere biological connection, should not be permitted to ripen into a constitutionally protected liberty interest. The New York Court of Appeals erred in stating that the applicable statute violated the United States Constitution. The costs to our society would be enormous if a subjective test is allowed to take hold in the State of New York and elsewhere. Unless review is afforded, promptness and finality in adoptions will become the exception rather than the rule.

POINT II

THE UNWED FATHER'S CONSTITUTIONAL RIGHTS WERE PROTECTED BY GIVING HIM NOTICE OF THE ADOPTION PROCEEDING AND THE OPPORTUNITY TO PARTICIPATE AT THE BEST INTERESTS HEARING

As noted earlier in this brief, the trial court's hearing of this matter was bifurcated and the initial phase was limited to the issue of the natural father's consent. Nevertheless, pursuant to Domestic Relations Law Section 111-a (as reproduced in relevant part at page 4 of the Petition) Mr. T. was afforded notice of the adoption proceeding and the opportunity to participate. After the remand of this matter by the Appellate Division, Second Department, to the Family Court, Mr. T., through counsel, has fully participated in eight days of the best interests hearing (also covering the natural mother's consent). As noted by this court in *Lehr*, upholding the constitutionality of Section 111-a, said statute automatically provides notice to several categories of unwed fathers who are likely to have assumed a certain degree of responsibility for the care of their children. 463 U.S. at 263. It is submitted that an unwed father's ability to partake in a "best interests" hearing, enabling him to possibly show why the adoption should not proceed, satisfies constitutional requirements.

In *Quilloin*, this Court confronted a Georgia statute that required an unwed father to be legitimated in order to be able to veto an adoption proceeding. The unwed father waited eleven years to file such a petition and Justice Marshall, writing for the unanimous Court, determined that applying the "best interest of the child" standard to the legitimation hearing satisfactorily protected the unwed father's rights. His application for legitimation under Georgia law was thus denied and the adoption was finalized. 434 U.S. 246 at 254.

The appropriate analysis should be whether Mr. T. has been given due process of law before his rights to Raquel Marie may be terminated. Certainly, this issue has not finally been determined as the "best interests" hearing has been held in abeyance

pending a final ruling on the consent issue. However, as Justice White observed in *Michael H.*:

> "The emphasis of the Due Process Clause is on 'process.' (citing *Moore v. East Cleveland*, 431 U.S. 494 at 542 (1977) (White, J., dissenting)... "A fundamental requirement of due process is 'the opportunity to be heard.' (citing *Grannis v. Ordean*, 234 U.S. 385 at 394 (1914)). "It is an opportunity which must be granted at a meaningful time and in a meaningful manner". (citing *Armstrong v. Manzo*, 380 U.S. 545 at 552 (1965)). *Michael H.*, 105 L.Ed.2d at 130B.

Raquel Marie would argue that her father, while not having a veto right over her proposed adoption - as he did not satisfy New York's prescribed statutory criteria - has been, and will be, afforded a meaningful opportunity to participate in her "best interests" hearing. His due process rights under the United States Constitution are thus sufficiently protected. As shown earlier in this brief, the states of Texas, California and Louisiana (for example) have determined that an unwed father's participation in a "best interests" hearing will usually satisfy federal constitutional requirements.

In *Caban*, Justice Stewart, as one of four dissenters, opined that New York's predecessor statute was not unconstitutional in that it afforded to certain unwed fathers the notice provision cited above and the ability to participate in the ultimate hearing on best interests as part of the adoption proceeding.

> ....an unwed father who has an established relationship with his illegitimate child is not denied the opportunity to participate in the adoption proceeding. His relationship with the child will be terminated through adoption only if a court determines that adoption will serve the child's best interest. The distinctions [between the consent provision and the notice provision] represent, I think, a careful accommodation of competing interests at stake and bear a close and substantial relationship to the State's goal of

> promoting the welfare of children. In my view, the Constitution requires no more. 441 U.S. at 395.

The notice provision of Section 111-a remains basically intact after *Caban* and, following Justice Stewart's analysis, Mr. T's failure to qualify as having an absolute veto right would still leave him with the full panoply of constitutional protections afforded by the statutory right to participate at the "best interests" hearing.

The Court of Appeals determined in this matter that, regardless of the extent and nature of the unwed father's commitment to the natural mother and child, the unwed father may insist upon an absolute veto right over any proposed adoption due to his "opportunity interest". None of the precedents of this Court has ever conferred such an absolute right upon an unwed father of a newborn child. Instead, as Justice Stevens noted in his separate opinion in *Michael H.*, with regard to the issue of visitation therein, the constitutional rights of unwed fathers may be met by an opportunity to participate in a "best interest" hearing. 105 L.Ed.2d at 112. Clearly, the notice provisions of New York's statutory scheme for adoptions provides Mr. T. with that very opportunity and should be upheld under the United States Constitution.

The inchoate opportunity rights of an abusive, unwed father should not be exalted over the right of the child to have her future determined in accordance with her best interests.

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Dated: White Plains, New York
October 31, 1990

Respectfully submitted,

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APPENDIX

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June 23, 1989

Hon. Martin H. Brownstein
Clerk of the Court
Appellate Division, Second Department
45 Monroe Place
Brooklyn, New York 11201

Re: *Matter of Raquel Marie*

Dear Mr. Brownstein:

The appeal herein is calendared for oral argument on June 27, 1989, at the same time as *Matter of Alphonse Fanelli*. Pursuant to the trial court's request, the Attorney General intervened in defense of the constitutionality of Paragraph e of Subdivision 1 of Section 111 of the Domestic Relations Law in that case and has accordingly filed a brief and will argue orally on the appeal. The Attorney General was not a party below in this case and only today received respondent's brief herein, which raises a similar challenge to the constitutionality of that statute. Under the circumstances, we do not intend to file a brief or to argue on this appeal, but instead ask the Court to accept this letter, which hereby incorporates our arguments in *Fanelli*, in defense of the statute's constitutionality.

In addition to the arguments we made in Point II of our brief in *Fanelli*, we add reference to the decision of the United States Supreme Court on June 15th in *Michael H. v. Gerald D.*, ____ U.S. ____, 57 L.W. 4691, 4694 n. 3, which we believe establishes that respondent's voluntary participation in the decision not to establish a "household of unmarried parents and their children" is fatal to any claim he might have had to substantive due process

rights as an unwed father under the statute. We also distinguish the decision in *Matter of Baby Girl S.*, 141 Misc. 2d 905 (Surr. Ct., N.Y. County 1988), *aff'd without opinion*, ____ A.D.2d ____ (1st Dep't 1989), because the respondent's voluntary decision not to live with the child or her mother, as required by the statute makes inapplicable here the *Baby Girl S.* trial court's reading of the statute to excuse a natural father's compliance with that requirement when the father is prevented, without fault or complicity of his own, from complying.

We also point out that the constitutional issue may be avoided if the Court holds that the marriage of the respondent affords him rights pursuant to Subidivision 1 of Section 24 and Paragraph b of Subdivision 1 of Section 111 of the Domestic Relations Law.

We are sending copies of this letter and our *Fanelli* brief to the parties on this appeal by Express Mail today.

Very truly yours,

s/s Robert J. Schack

Robert J. Schack
Assistant Attorney General